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Nos. 91-1111 and 91-1128

In the Supreme Court of the United States
October Term, 1992

HARTFORD FIRE INSURANCE CO., ET AL.,
AND
MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, ET AL.,
Petitioners,

v.

STATE OF CALIFORNIA, ET AL.,
Respondents.

On Writ of Certiorari To The United States
Court of Appeals For The Ninth Circuit

BRIEF OF 19 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF 19 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The States of Delaware, Florida,[1] Hawaii, Idaho, Iowa, Kentucky, Mississippi, Missouri, New Mexico, Nevada, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont and Virginia (hereinafter "Amici States") submit this brief in support of the nineteen Respondent States. The Amici States respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit in *In re Insurance Antitrust Litigation*[2] be affirmed.

INTEREST OF THE AMICI STATES

State attorneys general are under a mandate to enforce federal and state antitrust laws. The Amici States, therefore, have a substantial interest in ensuring that federal court

[1]The State of Florida is the Plaintiff in a similar lawsuit, *State of Florida v. Hartford Fire Ins. Co., et al.*, No. C-91-3819 CAL, N.D. Cal., currently stayed pending resolution of this case.

[2]*In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991).

application of antitrust laws is consistent with underlying congressional intent, this Court's past decisions, and sound public policy. Further, state governments have a vital interest in maintaining the integrity of their insurance regulatory programs.

The Amici States support the contention of the Respondent States that the McCarran-Ferguson Act[3] ("the McCarran Act") does not immunize the conduct and agreements at issue here.[4] Antitrust laws support and supplement state insurance regulation, serving as a deterrent to private anticompetitive conduct that occurs outside the state regulatory scheme and beyond the exemption granted by the McCarran-Ferguson Act. Application of the antitrust laws to insurance activities that are either unregulated or constitute boycotts, coercion, or intimidation does not conflict with state regulatory oversight of the business of insurance.[5] Petitioners' expansive view of the McCarran exemption invites a system of private regulation within the insurance industry where anticompetitive agreements made outside the state regulatory arena, as well as coercive enforcement activity related thereto, would be free from both antitrust and state regulatory scrutiny. State insurance regulators never reviewed the underlying anticompetitive agreements and conduct at issue, and it is inaccurate to portray

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[3]15 U.S.C. §§ 1011-1015.

[4]This Amici Brief addresses the McCarran-Ferguson Act questions at issue, including important public policy concerns inherent in the circuit court's decision. Although not addressed in this brief, the Amici States also support Respondents' contention that principles of international comity do not operate to deprive the federal courts of jurisdiction in this case, or counsel for abstention by the federal courts.

[5]As this Court recently stated

> Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls.

FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2176 (1992).

regulators as having approved the underlying coercive conduct involved here. Antitrust scrutiny will prevent Petitioners from circumventing state regulatory oversight by engaging in anticompetitive agreements and unregulated activity, and enforcing such agreements through boycotts and other coercion.

STATEMENT OF THE CASE

The Amici States adopt in full and incorporate by reference the Respondents' Statement of Facts. As a supplement to that statement, the Amici States provide the following background information.

Petitioners orchestrated a reinsurance boycott remarkably similar to the boycott in *United States v. South-Eastern Underwriters Ass'n ("SEUA")*, 322 U.S. 533 (1944), the case that provided the major impetus for the McCarran Act. Petitioners Hartford Fire Insurance Company, General Reinsurance, and others devised a scheme to eliminate long-tail and pollution insurance coverages from the marketplace. In early 1984, they realized that -- despite earlier efforts to achieve these goals through control of the Insurance Services Office ("ISO") drafting committees -- the new commercial general liability ("CGL") forms ISO would be filing with state regulators included long-tail and pollution coverages.[6] The conspirators knew that discontinuation of the popular long-tail and pollution insurance coverages would have to be industry-wide, or else they would lose market share to competitors who continued to offer those coverages. After the conspirators failed in the ISO forum, they brought foreign (alien) reinsurers into the

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[6]The two CGL forms were the product of "the most extensive industry review of policy forms ISO has ever undertaken," according to ISO Senior Vice President Richard Savage. *Underwriter's Report*, Jan. 12, 1984. The forms were filed in March 1984 to be effective November 1, 1985; by July 1984, they were set for use in 20 jurisdictions including three (3) of the filing states: Alaska, Massachusetts and Montana. *Joint Appendix at 121-123* ("J.A."). Thus, the defendants' agreement removed reinsurance support for forms already sanctioned by some state regulators.

conspiracy. Together, the conspirators forced other insurers to capitulate by exploiting certain market dynamics: that reinsurance is essential to insurers' ability to do business; that reinsurance transactions are not regulated by the states; and that a cyclical hardening of the reinsurance market would foreseeably reduce reinsurance availability. As the market hardened through 1986[7], the conspirators exercised their leverage.[8]

Bypassing state regulation and subverting market forces of supply and demand, the conspirators usurped the prerogatives of state regulators and the marketplace choices of consumers and competitors. The manifest purpose of the agreements and associated acts of coercion was to control not just the terms on which the defendant primary insurers would deal with their own reinsurers, but also the terms on which everyone else in the market would do business. This is the same conduct this Court condemned in *United States v. South-Eastern Underwriters Association* and Congress sought to prevent by approving only a limited antitrust exemption in the McCarran Act.[9]

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[7]*See, e.g.*, Shapiro, *Insurance Market Hardening in London*, Bus. Ins., Jan. 9, 1984, at 17; Brostoff, *Adequate Pricing Seen Waiting Just Off Stage*, Nat'l Underwriter, Feb. 17, 1984, at 10; Moore, *Sharp Rise in Cost of Reinsurance Protection*, Fin. Times of London, April 24, 1984, at 27; McIntyre, *Intermediaries Anticipate Tough Renewals*, Bus. Ins., November 12, 1984, at 1; Finlayson, *EIL [pollution insurance] Capacity is Decimated by the Lack of Reinsurance*, Bus. Ins., December 24-31, 1984, at 2.

[8]In view of the explicit instances of threats and coercion mentioned in the insurance trade press between 1984 and 1986, it is likely that full merits discovery will disclose the sorts of specific enforcement acts that even Petitioners acknowledge as sufficient to state a well-pled case of boycott.

[9]On March 22, 1988, the State of Texas, under its state antitrust act, filed an action similar but not identical to that of the Respondent States: *State of Texas v. Insurance Services Office, Inc., et al.*, 1991-1 Trade Cases ¶ 69,385 (Tex. Dist. Ct., 1991). Texas conducted extensive discovery and prevailed over dispositive motions based on the McCarran-Ferguson Act and other claimed exemptions and immunities from antitrust scrutiny. On March 27, 1991, the trial court entered a consent judgment disposing of all claims against Petitioners Hartford, Aetna, CIGNA ("INA"), ISO, Merrett, Jackson, and RAA. 1991-1 Trade Cases ¶ 69,385. The consent judgment (in which the defendants specifically deny any wrongdoing) bars Petitioners Hartford, Aetna, CIGNA, Merrett, Jackson, and RAA from all ISO discussions of General Liability policy forms to be used in Texas. It also prohibits Merrett, Jackson, and RAA from attending ISO Board and committee meetings regarding policy forms or Texas-related activities. ISO also agreed to provide statistical support for all reasonably comparable non-ISO General Liability forms and superseded ISO General Liability forms. *Id.*

SUMMARY OF ARGUMENT

The Amici States ask this Court to affirm the decision of the court of appeals for the following reasons:

1. Petitioners' conspiratorial agreements and acts are not exempt from antitrust scrutiny because the conduct does not fall within the intended scope of the McCarran exemption. The purpose of the McCarran-Ferguson Act was to preserve state regulation of the business of insurance, not to permit private agreements in restraint of trade. The McCarran-Ferguson Act was designed to redress precisely the situation presented here: (1) agreements among competitors and their suppliers regarding forms of coverage and availability of insurance made outside the context of state regulation; and (2) boycotts, coercion, and intimidation used to enforce those anticompetitive agreements.

2. The court of appeals was correct in holding that Petitioners engaged in boycotts, coercion, and intimidation, which are not exempt activities under the McCarran Act. As alleged in the complaints, Petitioners dictated the terms of trade to unwilling competitors. Along with other methods of pressuring competitors, conditional refusals to deal are classic Sherman Act boycotts, and therefore boycotts under the McCarran Act. The legislative history of Section 3(b) shows that Congress intended to outlaw the use of force by groups of insurance companies to compel competitors to adhere to cartel demands.

3. The court of appeals was also correct in holding that Petitioners had not demonstrated that they were entitled in the first instance to immunity under the McCarran-Ferguson Act. The restrictive agreements between the Petitioner primary insurers and foreign reinsurers were discussed, negotiated, and consummated outside state regulatory scrutiny and supervision. Restrictive agreements falling outside the realm of state-regulated cooperative action are not protected from antitrust scrutiny by the McCarran Act.

ARGUMENT

I. PETITIONERS' CONSPIRATORIAL AGREEMENTS AND ACTS ARE NOT IMMUNIZED BECAUSE THE CONDUCT DOES NOT FALL WITHIN THE INTENDED SCOPE OF THE McCARRAN-FERGUSON ACT EXEMPTION.

The McCarran-Ferguson Act[10] has two critical purposes: (1) to affirm the continued regulation and taxation by the states of the business of insurance by granting a limited federal antitrust exemption; and (2) to ensure the continued application of the antitrust laws to the insurance industry for all conduct falling outside the scope of the limited exemption. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-220 (1979). The exemption is limited to activities that are both the "business of insurance" and "regulated by state law." Section 3(b) imposes a further limitation on the scope of the exemption: it provides that any agreement or act of boycott, coercion, or intimidation remains subject to the federal antitrust laws. *Royal Drug*, 440 U.S. at 219.

Through the McCarran Act, Congress sought not only to preserve state regulatory authority over the business of insurance, but also to prohibit attempts by private combinations

[10]15 U.S.C. §§ 1011-1015.

and groups to control the industry.[11] *Id.* at 219-220. Certain concerted activities within the business of insurance are not protected under the McCarran Act from antitrust scrutiny, and can be divided into two distinct categories:

(1) restrictive agreements falling outside the realm of state-regulated cooperative action, 15 U.S.C. § 1012(b) (hereinafter Section 2(b)); and

(2) "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation," 15 U.S.C. § 1013(b) (hereinafter Section 3(b)).

The conduct challenged by Respondents falls into these two categories of non-exempt activity and is, therefore, subject to the antitrust laws.

II. THE COMPLAINTS, WHICH ALLEGE THAT A GROUP OF INSURERS AND REINSURERS FORCED COMPETITORS TO ACCEDE TO PARTICULAR TERMS OF TRADE, ESTABLISH A McCARRAN ACT BOYCOTT.

[11]The legislative history of the McCarran Act plainly shows that Congress did not intend to confer immunity on any unregulated conduct. The business of insurance was to be subject either to the federal antitrust laws or to state regulation and supervision: there were to be no loopholes for private restraints. *See* 91 Cong. Rec. 1485 (1945) (remarks of Sen. O'Mahoney); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 547-551 (1978). The policy underlying the limited McCarran antitrust exemption was described by Congressman Celler during the congressional debates:

> The wise procedure would be to bring in some constructive measure that would insure the integrity of State control but at the same time permit the Federal Government to ferret out wrongful and evil interstate combinations, monopolies and bad practices.

90 Cong. Rec. 6560 (1944).

A. Section 3(b) of the McCarran-Ferguson Act subjects to antitrust scrutiny any attempts by private combinations and groups to control the insurance marketplace through private enforcement agreements and acts.

In Section 3(b), Congress sought to guarantee continued antitrust scrutiny of private enforcement agreements:

> [A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this [boycott] provision.

91 Cong. Rec. 1480 (1945) (remarks of Sen. O'Mahoney), J.A. at 221-222. Congress intended the boycott exception to provide "an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 547 (1978). This safeguard is built into the structure of the McCarran Act itself:

> § 3(b) is an exception to § 2(b), and . . . Congress intended in the boycott clause to carve out of the overall framework of plenary state regulation an area that would remain subject to Sherman Act scrutiny. The structure of the Act embraces this exception. Unless § 3(b) is read to limit somewhat the sweep of § 2(b), it serves no purpose whatever.

Barry, 438 U.S. at 551.

The legislation was amended twice to broaden section 3(b) to ensure that the core safeguards of the Sherman Act remained applicable to the business of insurance even when regulated by

state law. *See* 91 Cong. Rec. 479, 1086-1090, and 1486 (1945); H.R. Conf. Rep. No. 213, 79th Cong., 1st Sess. (1945) (amendment extending the boycott provision beyond the moratorium period and amendment reinstating the prohibition against agreements as well as acts of boycott, coercion, and intimidation). The overriding purpose of the McCarran-Ferguson Act is to protect both state regulatory programs and the application of the antitrust laws, not to protect insurance companies. Every combination or agreement within the insurance industry against the public interest is prohibited by the McCarran Act. 91 Cong. Rec. 1486 (1945) (remarks of Senator O'Mahoney).

B. The Section 3(b) boycott exception was designed to prohibit exactly the type of private coercive conduct engaged in by Petitioners.

1. A McCarran boycott carries the full range of meaning given Sherman Act boycotts, including cartel agreements and acts to force competitors to accept specified business terms.

Section 3(b) of the McCarran-Ferguson Act is an absolute exception to the immunity provided by Section 2(b), and subjects agreements to "boycott, coerce, or intimidate" to the federal antitrust law. *See, e.g., Barry*, 438 U.S. at 551. As stated by this Court, the language, legislative history, and structure of the McCarran-Ferguson Act give guidance in determining the scope of the boycott exception. *Id.* at 540-41. The Ninth Circuit correctly interpreted Section 3(b) in accordance with its plain meaning.

The language of Section 3(b) supports Respondents' contention that the McCarran Act "boycott, coercion, or intimidation" terms carry the full range of traditional Sherman Act meaning. Congress placed no limitation upon the scope of the words: the "boycott, coercion and intimidation" language is broad and unqualified. *Id.* at 549-50.

The McCarran Act legislative history also indicates that Congress intended traditional Sherman Act boycott prohibitions to apply:[12] "[The boycott section] provides that at no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect." S. Rep. No. 20, 79th Cong., 1st Sess. 3 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945). *See Barry*, 438 U.S. at 546-47.

Under the Sherman Act, "boycotts are not a unitary phenomenon;" therefore, no single definition of the term exists. *Barry*, 438 U.S. at 543 *quoting* P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974). Sherman Act boycotts do have a common element, however: the use of concerted coercive agreements or acts as a means of eliminating rival methods of competition *or* of compelling conformance with cartel demands. *See Barry*, 438 U.S. at 541, 565. *See also, In re Workers' Compensation Ins. Antitrust Lit.*, 867 F.2d 1552, 1561 n.14 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989).

Petitioners concede that the use of enforcement activity to compel adherence to cartel demands is a boycott. *Pet. Br.*[13] at 28-30. To escape liability for their unlawful activities, Petitioners attempt to redefine the enforcement activity necessary to constitute a boycott. Petitioners argue that only

[12]The McCarran boycott provision is not, however, coextensive with all prohibitions of the Sherman Act. *See Barry*, 438 U.S. at 545 n.18. Such a construction would be contrary to McCarran's purposes. By limiting the language of Section 3(b) to "boycotts, coercion, or intimidation," Congress intended to allow for "salutary combinations" which were in the public interest, provided those combinations and agreements were in the open and approved by law, while ensuring that "every effective combination or agreement to carry out a program against the public interest" would be prohibited. 91 Cong. Rec. 1486 (1945). *Barry*, 438 U.S. at 549. *See* 91 Cong. Rec. 1487 (1945) (remarks of Senators Pepper and O'Mahoney).

[13]"Petitioners' brief" or "Pet. Br." refers to Brief for Petitioners in No. 91-1111.

absolute concerted refusals to deal designed to exclude competitors or customers from the market can constitute McCarran boycotts. *Pet. Br.* at 13.

Their argument fails because the scope of activities prohibited by Section 3(b) extends to all types of classic Sherman Act boycotts. Such boycotts include partial and conditional concerted refusals to deal, i.e., refusals to deal except upon particular terms. *Barry*, 438 U.S. at 543-45.[14] Under the Sherman Act, and therefore the McCarran Act, the boycott concept encompasses enforcement activities designed to compel the target of a boycott to adopt a certain standard of trade practice. Even otherwise exempt agreements under the McCarran Act regarding rates or terms of coverage can constitute Section 3(b) boycotts where an additional enforcement element such as force, pressure or compulsion is present.[15] *Id.* at 545 n.18.

While boycotts are not a "unitary phenomenon," this Court in *Barry* suggested a workable standard for determining whether a Section 3(b) boycott exists. Simple agreements to fix rates, without more, are not boycotts. Additional factors, such as

[14]In *Barry*, this Court cited as examples of Sherman Act boycotts, cases involving conditional and partial concerted refusals to deal. *See, e.g., Fashion Originators' Guild v. FTC*, 312 U.S. 457, 465-68 (1941); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 535-36 (1944); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Other Sherman Act cases also find partial and conditional refusals to deal to constitute classic boycotts. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 490 U.S. 1019 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 456 (1986); and *In re Workers' Compensation Ins. Antitrust Lit.*, 867 F.2d 1552, 1561-62 (8th Cir.), *cert. denied*, 492 U.S. 920 (1989).

[15]This view that virtually all Sherman Act violations involving additional pressure, force or compulsion can constitute Section 3(b) boycotts, is directly supported by the legislative history of the McCarran Act: *See, e.g.*, 90 Cong. Rec. A4407 (1944) (National Association of Insurance Commissioners Memorandum of Explanation) ("Where any group of insurers seek [sic] to act in concert to enforce so-called advisory rates, the antitrust laws will not be inapplicable").

enforcement activity aimed at compelling adherence to terms of trade, however, do constitute boycotts. Defining Section 3(b) to encompass enforcement activities faithfully carries out congressional intent and understanding.

2. As alleged in this case, the SEUA case involved refusals to reinsure risks of competitors who did not accede to the terms dictated by a private combination; in SEUA the conditional refusals to reinsure were termed "boycotts."

The "boycott, coercion and intimidation" language in Section 3(b) originated in *United States v. South-Eastern Underwriters Ass'n* ("SEUA"), 322 U.S. 533 (1944). *SEUA* involved an insurance rate setting agreement accompanied by enforcement activities. *Id.* at 534. The enforcement activities, not the rate setting agreements, were termed "boycotts." *Id.* at 535-36. As noted in *Barry*, the conspirators in *South-Eastern Underwriters* "not only fixed rates but also, in the Court's words, 'employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [SEUA] members on [SEUA] terms.'" *Barry*, 438 U.S. at 539 n.8 (emphasis added). One of the activities labelled as a boycott was that where "[c]ompanies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks." *SEUA*, 322 U.S. at 535.

The legislative history of the McCarran Act provides numerous examples from the practices of the South-Eastern Underwriters Association and similar private board organizations that illustrate that one of the "vices in the insurance industry" Congress sought to eradicate was the boycotting of competitors who refused to do business on terms acceptable to the combinations. Congress intended to outlaw the "private agreements by which these [SEUA] rates were enforced." It was concerned with the policy of these associations of denying reinsurance to all companies who did not adopt their schedule of rates and use their standardized policy terms. While the

SEUA case was the focal point for addressing boycott activities, Congress also investigated the identical practices used by other associations throughout the industry.[16]

The boycotting practices of the board organizations[17] therefore provide useful guidance in determining the intent of Congress with respect to the Section 3(b) exception.[18] Reinsurance was a tool used by these organizations to control the market and dictate the terms of trade.[19] 89 Cong. Rec.

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[16]The rules and regulations of the private associations, including the Southeastern Underwriters Association, provided Senator O'Mahoney with a vivid example of "the sort of agreement which ought to be condemned," and exemplified the larger evil of "regulation by private combinations and groups," that required the continued application of the Sherman Act. *Barry*, 438 U.S. at 549, *citing* 91 Cong. Rec. 1483, 1486 (1945).

[17]Such organizations include the Southeastern Underwriters Association, the Insurance Executives Association, and the Pacific Coast Board of Fire Underwriters.

[18]Significantly, Petitioners ignore the legislative history relating to the definition of a Section 3(b) boycott. In the first part of their boycott argument (*Pet. Br.* at 32-35) they cite the legislative history solely for the proposition that insurance requires uniformity and cooperation, and do not substantively address the meaning of boycott. Petitioners' avoidance is even more apparent when they fail to address the legislative history in their arguments on *SEUA*, even though they admit "the boycott exception is properly construed against the background of *SEUA*." *Pet. Br.* at 35. The only legislative history cited (*Pet. Br.* at 36) reiterates the uncontested issue that "mere price-fixing" is not a boycott. Petitioners are forced to avoid numerous descriptions and examples of boycotts within the history because Respondents' alleged boycotts are closely parallel.

[19]In congressional testimony, Mr. Edward L. Williams, President of the Insurance Executives Association, explained the association's policy of refusing to reinsure nonmembers:

> We say, "Here is a certain group of 10, 25, or 200." We say between ourselves, "When you belong to us and have the same ideas we do, we will automatically reinsure you."
>
> I am cutting through the guts of the thing. We don't want to undertake to reinsure somebody that might do something different. We won't say we will reinsure anybody.

8530-31 (1943) (remarks of Representative Voorhis). The Attorney General described the use by the private combinations of denial of reinsurance to force competitors to agree to particular terms: "[t]he principal instruments utilized to compel adherence to private rate-fixing agreements are reinsurance and 'separation'. . . . [t]he heavy club used by the board companies to police their rating agreements and to obtain adherence of competitors to such agreements is reinsurance."[20] *Joint Hearing Before Subcomms. of the Committees on the Judiciary on S. 1362, et al.*, 78th Cong., 1st Sess. 48 (1943) ("*Joint Hearing*") (Statement of Hon. Francis Biddle, Attorney General of the United States). He testified that the organizations' concerted private use of economic power to force desired results constituted unlawful boycotts. *Id.* at 45-48.

Senator O'Mahoney, who played a prominent role throughout the legislative process, observed that the insurance combinations "will exclude from membership those that do not play the game the way they want it played." *Id.* at 495-496. Section 3(b) was included so that "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited." 91 Cong. Rec. 1480 (1945) (remarks of Sen. O'Mahoney). Congress intended these exclusionary practices to remain subject to Sherman Act scrutiny.

Joint Hearing Before Subcomms. of the Committees on the Judiciary on S. 1362, et al., 78th Cong., 1st Sess. 302 (1943). Senator O'Mahoney, who had questioned Mr. Williams, later remarked that the Insurance Executives Association attempted to dictate "how the business [of insurance] should be conducted." 91 Cong. Rec. 1485 (1945).

[20]The indictment in the South-Eastern Underwriters litigation charged, in part, an agreement "to adhere to standard terms, conditions, and clauses relating to coverage of risks established by the South-Eastern Underwriters Association; [and] to withdraw reinsurance facilities from fire insurance companies not members of South-Eastern Underwriters Association (that is most important)." *Joint Hearing* at 44.

Petitioners try to distinguish *SEUA* from this case by arguing that SEUA "attempt[ed] to drive non-S.E.U.A. members from the market through an absolute refusal to deal with them on any terms." *Pet. Br.* at 36 However, in *SEUA*, a group of insurers attempted to force competitors to adhere to particular terms of trade by refusing to reinsure non-complying companies. The complaints herein allege precisely the same type of enforcement activity: Petitioners refused to reinsure companies not using the claims-made form. The conduct of SEUA and other board organizations was only exclusionary (an "absolute refusal") in the sense that the combination "successfully excluded from insurance business all together by boycott, restraints, and coercion all who would not adhere to their unlawful practices." H.R. Rep. No. 873, 78th Cong., 1st Sess. 16 (1943) (emphasis added). Similarly, the Petitioners in this case conspired to drive competitors from the market unless they adhered to the conspirators' terms.

In enacting the McCarran Act, Congress intended to allow states to fix rates and determine use of policy forms. The legislative history discussed above clearly shows that Congress did not intend to insulate insurance companies that, outside any state-permitted structure or procedure, agree among themselves that they shall determine the terms and types of coverage offered in the marketplace. Such private conduct is exactly the type of anticompetitive action that Congress sought to prohibit under Section 3(b). If the boycott exception does not cover the alleged conduct of petitioners in this case, then private parties are permitted to control the market without congressional sanction and without state supervision or control. Application of the antitrust laws to such conduct cannot harm state regulation; it can, however, ensure that concerted boycotts against groups of competitors would not have immunity.[21]

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[21]The factual allegations in this case closely parallel those in *Barry*:

> This is not a case where a State has decided that regulatory policy requires that certain categories of risks be allocated in a particular fashion among insurers, or where a State authorizes insurers to decline

3. Petitioners' formulation of a boycott standard conflicts with the language, policy and history of the Act. Their definition of boycott would swallow the exception, and effectively create an absolute immunity from antitrust scrutiny.

Petitioners' core argument in support of immunity is that the complaints allege nothing more than "the making or implementation of protected agreements."[22] *Pet. Br.* at 14. Petitioners combine this misstatement of and disregard for the facts with an unjustifiably restrictive reading of the Section 3(b) boycott exception to immunize their actions from state regulation and antitrust scrutiny. Under their boycott standard only absolute refusals to deal (and offers to deal only upon discriminatory terms) designed to drive competitors from the market can constitute Section 3(b) boycotts.

The standard urged by Petitioners does not survive close analysis. To reach the conclusion urged by Petitioners, this Court would have to ignore the overwhelming body of Sherman Act boycott law that establishes that enforcement agreements, including conditional refusals to deal, are McCarran boycotts. Boycotts are not unitary phenomena: conditional refusals to deal designed to compel unwilling competitors to adhere to particular terms of trade are classic boycotts.

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to insure particular risks because the continued provision of that insurance would undermine certain regulatory goals, such as the maintenance of insurer solvency. In this case, a group of insurers decided to resolve by private action the problem of escalating damages claims and verdicts by coercing the policyholders of St. Paul to accept a severe limitation of coverage essential to the provision of medical services. . . . We conclude that this conduct, as alleged in the complaint, constitutes a "boycott" under § 3(b).

Barry, 438 U.S. at 554 (footnote omitted).

[22]To arrive at this conclusion requires a misconstruction of the factual allegations, and a disregard for all reasonable inferences favorable to the plaintiffs.

Petitioners' arguments flatly contravene the legislative history and policy of the Act, which clearly establish that the use of economic power to compel capitulation to particular terms of trade are McCarran boycotts. The Court held that such uses of economic power to force competitors to agree to certain terms were boycotts, and characterized that conduct as "[t]he kind of interference with the free play of competitive forces. . . which the Sherman Act has outlawed." *SEUA*, 322 U.S. at 536. Petitioners' conduct in this case is virtually identical and is precisely the type of activity that remains subject to antitrust scrutiny under the McCarran Act.

Petitioners' characterization of the allegations misstates Respondents' case. The complaints allege activities and agreements occurring *outside* of the states' regulatory structures. Petitioners privately decided not to reinsure certain risks and agreed upon the mechanism necessary to force competitors to comply. Those private agreements and their marketplace effects closely parallel the conduct that this Court condemned as a Section 3(b) "boycott" in *Barry*. 438 U.S. at 554.

Petitioners would have this Court dismiss the allegations of unregulated agreements and enforcement mechanisms in the complaints as simply "pejorative characterizations" of their actions by Respondents. Petitioners would have this Court further condone their coercive market activities as "mere implementation" of protected activities. Such a formulation would swallow the boycott provision of the McCarran Act and frustrate the congressional intent to proscribe the coercive conduct alleged herein and condemned by this Court in *SEUA*. Under this formulation, *Barry* and *SEUA* would be of mere historical interest. The same enforcement activities condemned in those cases would be condoned as "mere implementation" in this case. Viewing the complaints as a whole, the court of appeals properly found more than a simple agreement on terms; it found enforcement activity designed to compel conformance with cartel demands. Such conduct is not exempt under the McCarran Act. In proposing an exceedingly narrow and highly artificial interpretation of Section 3(b), Petitioners are in effect

asking this Court to give them, by way of construction, what the industry was unable to get from Congress: complete immunity from the antitrust laws. We respectfully urge the Court to decline that invitation.

III. THE McCARRAN-FERGUSON ACT DOES NOT CONFER ANTITRUST IMMUNITY ON UNREGULATED PRIVATE ANTICOMPETITIVE CONDUCT.

Section 2(b) of the Act contains two separate requirements for immunity, which must be satisfied independently: (1) the practice must be the "business of insurance"; and (2) it must be regulated by state law. 15 U.S.C. § 1012(b). This section discusses the state regulation requirement for conduct that is not boycott, coercion, or intimidation. In analyzing a claim of exemption based on state regulation, the relevant inquiry is whether the antitrust challenge relates to non-regulated business of insurance activities. Any activities that are not regulated by state law fail to qualify for McCarran immunity.

A. Because there was no state regulation of the challenged conduct, it is not immune under the McCarran Act and is subject to full antitrust scrutiny.

An examination of the actual status of state regulation for McCarran purposes reveals that the specific activities of reinsurers challenged here are not regulated. The focus for McCarran purposes is on whether the activity is regulated by state law, not whether the entity is regulated.[23] Reinsurance contract terms, rates, and forms are not filed or reviewed by state regulators.[24] Moreover, states examine neither the

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[23]Petitioners concede this point. *See e.g., Pet. Br.* at 17.

[24]As explained by Ms. Mindy Pollack, Assistant General Counsel of Petitioner Reinsurance Association of America ("RAA") in a 1987 seminar jointly sponsored by RAA and the Insurance Information Institute:

purchase and sale of reinsurance nor the interstate or foreign reinsurance markets. In fact, "[s]tate insurance departments do not have the ability to assess the strength of companies located in other countries; they cannot be sure of how well regulated alien reinsurers are." *Proceedings of the Reinsurance Seminar*, Cannon House Office Building, Washington, D.C., 20 (1987).

State regulatory review of ISO forms is not regulation of the foreign reinsurance conduct challenged here, nor is it a substitute for such regulation. The challenged conduct affected market conditions. State regulation of forms is not sufficient to reach market conduct. By contending that the authority of the states to review the terms and conditions of primary insurance offered in this country is sufficient to satisfy the state regulation element of the McCarran Act, Petitioners implicitly concede that activities within interstate and foreign reinsurance markets are not regulated by the states. *See Pet. Br.* at 17. As will be discussed more thoroughly in the next section, Petitioners' contention is contrary to the express language and intent of the McCarran Act.

B. The state regulation test under the McCarran Act requires that States displace competition by meaningful regulation: only actual regulation of a challenged practice is sufficient to meet Section 2(b) requirements.

1. The exemption under the Act applies only "to the extent" that the activity at issue is regulated by the state.

> Subject to only a few exceptions, state insurance departments do not approve reinsurance contracts or reinsurance rates. . .[W]e do not have the same oversight that we have in primary insurance business with regard to approval of policies and policyholder protection.

Proceedings of the Reinsurance Seminar, Cannon House Office Building, Washington, D.C. 22 (1987).

To foreclose attempts by would-be private regulators to control the insurance marketplace, Congress intended that only actual regulation of the specific conduct in question satisfy Section 2(b).

The language of the McCarran Act provides antitrust immunity only "to the extent" that the business of insurance is regulated by state law. 15 U.S.C. § 1012(b). The plain language of the McCarran Act exemption requires a determination of whether the challenged <u>practice</u> is regulated by the state as opposed to whether <u>insurance</u> is so regulated. To hold general regulation of insurance sufficient to exempt a challenged practice from the antitrust laws is to give the exemption an expansive construction. Exemptions from the antitrust laws must be narrowly construed and limited to the scope clearly intended by Congress. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). Further, a broad reading would mean regulation of any aspect of the business of insurance would satisfy the state regulation requirement for all insurance practices, thereby defeating the purpose of the McCarran Act and frustrating the application of the antitrust laws to the insurance industry.

Congress never intended state insurance department regulation of *some* insurance company activities to displace the federal antitrust laws for *all* activities. Where no actual state regulation of insurance activity exists, Congress intended the antitrust laws to apply. An expansive interpretation of the regulation requirement is inconsistent with both the precise language of the McCarran Act and the Act's legislative history.[25] *See, e.g.*, 91 Cong. Rec. 1443-1444 (remarks of Sen.

[25]Petitioners selectively quote from the legislative history regarding the importance of reinsurance and the need for uniformity within the business. *Pet. Br.* at 19-20. Their emphasis on the importance of reinsurance only serves to strengthen Respondents' assertion that reinsurance was an effective means of compelling adherence to cartel demands. Further, Petitioners do not and cannot cite to any legislative history which shows an intent by Congress to immunize non-regulated reinsurance transactions. *But see* 91 Cong. Rec. 1485 (1945)

McCarran, Ferguson, White, and O'Mahoney), 1481 (remarks of Sen. Pepper), and 1488 (remarks of Sen. Barkley) (1945). For example, during the debate on the Conference Report, the following exchange occurred:

> "SENATOR WHITE: . . . My view is that the State may regulate. If, however, the State goes only to the point indicated [prohibition of restraints in trade], then <u>these [Sherman, Clayton and Federal Trade Commission Acts] Federal Statutes apply throughout the whole field beyond the scope of the State's activity.</u>"
>
> "SENATOR McCARRAN: That is a correct statement."

91 Cong. Rec. 1444 (1945) (emphasis added). Senator Ferguson, in discussing state authority to regulate and tax insurance under the McCarran Act, used the language "if the States were <u>specifically to legislate upon a particular point</u>" to explain the quality of state regulation necessary for immunity under the Act. 91 Cong. Rec. 1481 (1945) (emphasis added).[26] President Roosevelt's message in connection with signing the McCarran-Ferguson Act further implies that a general regulatory scheme is insufficient to satisfy Section 2(b):

(remarks of Sen. O'Mahoney); 90 Cong. Rec. 6560 (1944) (remarks of Rep. Celler); 90 Cong. Rec. 6626 (1944) (remarks of Sen. O'Mahoney) (no state supervision of reinsurance). *See also*, *Joint Hearing* at 48 (Statement of Hon. Francis Biddle) (distinguishing agreements on specific treaty terms from general agreements dictating uniformity within the marketplace); *Joint Hearing* at 404 ("A third argument is the allegation that the consummation of reinsurance requires uniform rates. Every insurance man knows that is pure bunk").

[26]In a post enactment article, Senator McCarran explained that 2(b) requires actual regulation of specific conduct: "The State law should be explicit with respect to the practice which it sought to regulate." *See* McCarran, *Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1*, 34 A.B.A.J. 539, 542 (1948).

> After the moratorium period, the Anti-Trust Laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved.

Press release by President Roosevelt (Mar. 10, 1945), *reprinted in* Donovan, *Regulation of Insurance Under the McCarran Act*, 15 Law & Contemp. Prob. 473, 478 (1950) (emphasis added).[27]

Congress refused to grant a blanket antitrust exemption to the insurance industry. Indeed, the McCarran Act embodies the congressional policy that states may regulate the business of insurance, but, that absent state regulation, the business should be subject to full competition.[28] "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the State." 13 *Public Papers and Addresses of*

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[27] *See also* 91 Cong. Rec. 1444 (1945) (remarks of Senator White) ("[T]he force and effect of [the Sherman Act] may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation"); 91 Cong. Rec. 1482 (1945) (remarks of Senators Murdock and Pepper).

[28] For example, during the debate on the Conference Report, the following exchange occurred:

> SENATOR BARKLEY: I should like to ask, in this connection, whether, where States attempt to occupy the field--but do it inadequately--by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, is it the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these [antitrust] acts would apply?
>
> SENATOR McCARRAN: That is my interpretation.

91 Cong. Rec. 1444 (1945) (emphasis added).

Franklin D. Roosevelt: 1944-45 587 (Rosenman, ed. 1950) (commentary of President Roosevelt on signing the McCarran Act) *quoted in Royal Drug*, 440 U.S. at 224. Section 2(b) allows the states to permit "combinations" among insurers if they are in the public interest, "provided those combinations and agreements [are] in the open and approved by law." 91 Cong. Rec. 1486 (1945) (remarks of Sen. O'Mahoney). "Public supervision of agreements is essential [to immunize the conduct]." *Id.* .

This Court's decision in *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), is not contrary to a finding that Section 2(b) requires actual state regulation of the particular conduct at issue. In *Nat'l Casualty*, the Federal Trade Commission ("FTC") challenged certain unfair and deceptive insurance advertising practices under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *Id.* at 562. This Court rejected as "not persuasive in the instant cases" the FTC's argument that the state regulatory laws were not effectively applied and, therefore, did not meet Section 2(b) requirements. *Id.* at 564. This Court, in doing so, focused narrowly on the regulation of the specific conduct at issue, rather than upon the existence of a general state regulatory scheme:

> An examination of [the McCarran Act] and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws.

id. at 562-563 (footnote omitted) (emphasis added). Therefore, in analyzing a claim of exemption under the McCarran Act, the relevant question is whether the challenged practices are regulated by state insurance laws, rather than whether a general regulatory scheme exists. *Id.*

Petitioners' view of state regulation would provide an absolute immunity for private anticompetitive behavior that does

violate Section 3(b), since all states have enacted some form of insurance regulation. Such immunization of private anticompetitive conduct flatly contravenes the plain language, congressional intent, and policy of the McCarran Act. To interpret Section 2(b) to require only a general statutory scheme would leave the Section 3(b) boycott prohibition as the sole restraint upon anticompetitive conduct. The intent behind the McCarran Act, to provide two safeguards against private regulation, would be defeated.

2. Prohibitory legislation, standing alone, does not displace antitrust scrutiny of insurance activities.

Section 2(b) states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business." Where application of federal antitrust laws does not conflict with state insurance regulation, the Section 2(b) requirement is not met, and the business of insurance remains subject to Sherman Act scrutiny.[29] In the area of state prohibitory legislation it is clear that application of the federal antitrust laws does not conflict with state laws. *See* 91 Cong. Rec. 1444 (1945) (remarks of Senators Pepper and O'Mahoney).

Neither state antitrust acts nor state Unfair Insurance Practices Acts ("UIPAs") should be construed to trigger

[29]Petitioners' professed concern for "protecting state regulation of insurance from federal antitrust interference" (*Pet. Br.* at 47) is unwarranted. Ann Richards, Governor of Texas and Allene Evans, currently a member of the Texas Department of Insurance, testified before a United States House of Representative Subcommittee that a state's power to regulate insurance would be unaffected even if McCarran were repealed. "Let me assure you that the State's power to regulate is in no way weakened by repealing the McCarran-Ferguson antitrust exemption. In fact, it will give us additional strength." *Hearing Before the Subcommittee on Economic and Commercial law on the Committee on the Judiciary on H.R. 9*, 102nd Cong., 1st Sess. 17 (1991). In 1990, Texas amended its state antitrust act to repeal the antitrust exemption for the business of insurance. *See* Note 33.

McCarran Act antitrust immunity.[30] The McCarran Act was passed to ensure that Sherman Act prohibitions did not <u>interfere</u> with state regulatory policy.[31] In the case of state unfair practices acts, the state regulatory policy complements the Sherman Act, rather than conflicts with it. The unfair insurance practices acts passed by the states prohibit "boycott, coercion, and intimidation," just as the Sherman Act and the McCarran Act exception itself.[32] Holding state unfair practices acts sufficient to satisfy the state regulation requirement under Section 2(b) of the McCarran Act would provide antitrust immunity to the very conduct prohibited by such acts, as well as by the McCarran and Sherman Acts.

Federal antitrust laws also do not invalidate, impair, or supersede state antitrust laws -- these laws are mutually compatible and readily accommodated. State antitrust laws and UIPAs are not truly "regulatory" legislation. They do not displace competition with regulation, but rather provide rules of conduct for the competitive market. Finally, state antitrust laws are not laws "enacted by any State for the purpose of regulating the business of insurance, or which impose[s] a fee or tax upon

[30]To the extent that *Nat'l Casualty* stands for the proposition that "prohibitory legislation" displaces federal antitrust scrutiny, the legislative history of the McCarran Act discussed earlier is to the contrary.

[31]The legislative history strongly suggests that UIPAs and state antitrust laws are not the type of state regulatory control Congress originally contemplated as preempting federal antitrust scrutiny. *See Joint Hearing* at 38-41, 52-56; 89 Cong. Rec. A5385 (1943); 90 Cong. Rec. 6419 (1944); and 91 Cong. Rec. 480-81, 1444. *See also*, Weller, *To Preempt or to Accommodate: The Question of State and Federal Antitrust Laws Under the McCarran-Ferguson Act*, 9 Toledo L. Rev. 421 (1978).

[32]The Joint Committee Report presented to the NAIC with the final draft of the NAIC Model Act, emphasizes that "incorporation by any state of [the boycott provision] cannot make inapplicable [Section 3(b) of McCarran, but will] minimize the likelihood of parallel action by the federal government." NAIC Proceedings, 381, 383-84 (January, 1947). Thus, this legislation was not intended to displace the Sherman Act.

such business,"[33] and therefore do not meet the requirements of Section 2(b).

C. The legislative history of the McCarran-Ferguson Act supports the use of a state regulation test based on the state action doctrine first enunciated by this Court in Parker v. Brown.

The legislative history of the McCarran Act indicates that Congress fully intended Section 2(b) to be interpreted consistently with this Court's decision in *Parker v. Brown*,[34] 317 U.S. 341 (1943). Commentators relying on the legislative history have argued that the state regulation requirement is essentially an incorporation of the *Parker* state action doctrine. *See, e.g.*, Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 615-19; and Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 Wm. & Mary L. Rev. 81, 101-102 (1983).[35]

[33]Some states do not exempt the business of insurance from their antitrust laws. *See, e.g.*, Tex. Bus. & Com. Code § 15.05(g) ("An exemption otherwise available under the McCarran-Ferguson Act does not serve to exempt activities under [the Texas Free Enterprise & Antitrust Act]").

[34]While the *Parker* state action standard may be incorporated in Section 2(b) of the McCarran Act, Section 3(b) of the Act clearly limits the scope of immunity provided by state action under Section 2(b). The *Parker* Court based the exemption on the absence of congressional intent to apply the Sherman Act to state action. The legislative history of the McCarran Act, however, demonstrates that Congress intended the Sherman Act to apply to boycotts, coercion, and intimidation even when the state regulates that conduct. Therefore, the state action doctrine can never be used to immunize acts or agreements of boycott, coercion, or intimidation prohibited under Section 3(b). *See, e.g.* 91 Cong. Rec. 480-81 (1945) (remarks of Sen. Ferguson); 91 Cong. Rec. 1443 (1945) (remarks of Senators McCarran and Ferguson); 91 Cong. Rec. 1481 (1945) (remarks of Sen. Ferguson). *See also Barry*, 438 U.S. at 547-48, 551; *Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075, 1078-79 (4th Cir. 1976); Carlson, *The Insurance Exemption from the Antitrust Laws*, 57 Tex. L. Rev. 1127, 1147-50 (1979).

Although the Court need not reach this issue to determine whether Petitioners' conduct was regulated by the States, there is considerable support in McCarran Act language, policy, and history for use of the *Parker* standard. The language of 2(b) -- "to the extent that such business is not regulated by state law" -- is compatible with the state action interpretation. The *Parker* decision was discussed on several occasions during the debates on the McCarran Act.[36] During the House debate, Congressman Russell of Texas cited *Parker* as authority that application of the federal antitrust laws to insurance companies would not destroy state insurance regulation:

> *Parker v. Brown* (317 U.S. 341) upheld state regulations . . . The insurance companies state that if insurance is held commerce, all state regulation will be held to be a violation of the antitrust laws, and especially in establishing rates. And in this they are as wrong as their other contentions. The Supreme Court has held against them every time the question has been presented to the Court. . . In *Parker v. Brown* (317 U.S. 341), the Supreme Court held against this contention.

[35]Extensive discussion of the *Parker* doctrine as it relates to the McCarran Act may be found in Anderson, *Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond*, 25 Wm. & Mary L. Rev. 81, 95 *et seq.* (1983); Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 615-19; Kintner & Bauer, *Application of the Antitrust Laws to the Activities of Insurance Companies: Heavier Risks, Expanded Coverage, and Greater Liability*, 63 N.C.L. Rev. 431, 473-76 (1985); Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. Rev. 265, 289 (1979); Carlson, 57 Tex. L. Rev. at 1150-61.

[36]The *Parker* state action doctrine was also discussed during the hearings. *See, e.g.*, *Joint Hearing* at 51-54 (Statement of Hon. Francis Biddle, Attorney General of the United States); 131-32 (Statement of Hon. Wendell Berge, U.S. Assistant Attorney General).

89 Cong. Rec. 10,150 (1943) (remarks of Rep. Russell). Senator O'Mahoney, in discussing the final version of the McCarran-Ferguson legislation, expressed the view that the McCarran Act incorporated the *Parker* doctrine in its state regulation requirement:

> I take it that the Senator is apprehensive less a statute passed by a State attempting to give validity to a private agreement to regulate would be recognized under this language [§ 2(b)]. I think it would not, because on page 351 of the same case, Parker against Brown, I find this language from the Supreme Court:
>
> > True, a State does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful (*Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-347).

91 Cong. Rec. 1480 (1945), J.A. at 221. The National Association of Insurance Commissioners ("NAIC") also took the position that Section 2(b) is essentially an enunciation of the *Parker v. Brown* decision.[37] *See also* 89 Cong. Rec. 8532 (1943) (remarks of Representative Voorhis).

The *Parker* state action doctrine, like Section 2(b), addresses federalism concerns, and is premised on state regulation of challenged conduct. *Parker* immunizes state governments and private parties from antitrust scrutiny when state regulation of an activity exists.[38] Defendants exercising

[37]NAIC Memorandum of Explanation, *reprinted in* 90 Cong. Rec. A4407 (1944). *See also*, NAIC, *Monitoring Competition: A Means of Regulating the Property And Liability Insurance Business*, 27 n.58 (1974).

[38]The *Parker* standard requires that private anticompetitive conduct (1) must be clearly articulated and affirmatively expressed as state policy and (2) must be actively supervised by the state before antitrust immunity applies. *Patrick v. Burget*, 486 U.S. 94, 100 (1988).

governmental powers are not immune from antitrust scrutiny if their activity is (1) private; and (2) unsupervised. This exact policy underlies the McCarran 2(b) state regulation requirement: the business of insurance must be supervised by the states. Public supervision is essential for immunity to apply. *See* 91 Cong. Rec. 1486 (1945) (remarks of Senator O'Mahoney).

This Court's focus on a clear state intention to substitute meaningful state regulation for competition, leaving no gaps for private governments, runs through the recent treatment of the related state action doctrine. This Court recently explained the policy reason underlying *Parker*: "We referred to the purpose of preserving the State's own administrative policies, as distinct from allowing private parties to foreclose competition. . . ." *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2177 (1992) (discussing *Patrick v. Burget*, 486 U.S. 94 (1988)). In *Ticor*, this Court focused its analysis on whether there was actual regulation of the anticompetitive conduct at issue: "In the absence of active state supervision in fact, there can be no state-action immunity for what were otherwise private price fixing arrangements." 112 S. Ct. at 2179.

This policy of eliminating private control of interstate commerce, and preserving the state's own regulatory policies, is echoed in the McCarran-Ferguson Act.[39] It would seem anomalous for this Court to conclude as it did in *Ticor* that the state regulation of title insurer search and examination fees was insufficient for "active supervision" yet the lack of <u>any</u> state review <u>under the same statute</u> of the boycotts alleged in Respondents' complaints was sufficient for McCarran immunity. Whether Section 2(b) is the embodiment of *Parker* or simply analogous to it, the state regulation requirement represents a

[39]"[T]here are three forms of regulation. There is State regulation. . . . There is Federal regulation. . . .

The third, and this has been harmful to the public interest, is regulation by private combinations and groups. . . . that type of regulation would be absolutely outlawed should the conference report be adopted." 91 Cong. Rec. 1483 (1945) (remarks of Senator O'Mahoney), J.A. at 223.

Congressional policy decision to immunize only conduct that is actually subject to regulation. Interpreting Section 2(b) consistently with the *Parker* state action standard prevents unintentional grants of immunity to insurers, and ensures that state regulatory prerogatives are not usurped by private insurance cartels.

CONCLUSION AND PRAYER

The purpose of the McCarran-Ferguson Act was to permit state-authorized and supervised cooperative insurance activity, not to give insurance companies carte blanche to engage in private anticompetitive agreements and acts occurring outside state regulatory authority, or boycotts, coercion, and intimidation. In this case, a private combination directly dictated the availability of certain types of coverages in the marketplace, usurping the prerogatives of state regulators and the choice of competitors and consumers. Such conduct is outside the scope of the McCarran-Ferguson Act exemption and proscribed by the antitrust laws.

For the foregoing reasons, the Amici States respectfully request that the decision of the Ninth Circuit in the instant case be affirmed.

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